Stagehands Referral Service, LLC *and* Stephen Foti

International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO (Meadows Music Theatre) *and* Stephen Foti. Cases 34–CA–10971 and 34–CB–2774

April 29, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On January 7, 2009, Administrative Law Judge Steven Davis issued the attached supplemental decision.[1] The Respondents filed exceptions, and the General Counsel filed an answering brief.

The National Labor Relations Board[2] has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[3] and conclusions, and to adopt the recommended supplemental Order.

Although the Respondents' exceptions refer to their posthearing brief, the Respondents did not submit a supporting brief or refile their posthearing brief as a supporting document. The posthearing brief is not itself part of the record before the Board as defined in Section 102.45(b) of the Board's Rules and Regulations. See *CPS Chemical Co.,* 324 NLRB 1018, 1018 fn. 2 (1997). Therefore, our review of the Respondents' arguments is limited to the exceptions document and any citation of authorities and supporting argument contained therein. See Board's Rules and Regulations Section 102.46(b)(1). These exceptions fail to demonstrate a basis for overturning the judge's findings. We therefore adopt the judge's decision. See *James Troutman & Associates,* 299 NLRB 120 (1990), affd. *NLRB v. James Troutman & Associates*, 935 F.2d 275 (9th Cir. 1991) (unpublished table decision).

ORDER

The National Labor Relations Board adopts the recommended supplemental Order of the administrative law judge and orders that the Respondents, International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO, its officers, agents, and representatives; and Stage Hands Referral Service, LLC, Hartford, Connecticut, its officers, agents, successors, and assigns, jointly and severally, shall make Stephen Foti whole by paying to him the total backpay amount of $77,455, plus interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholdings required by Federal and State law.

Dated, Washington, D.C. April 29, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Patrick Daly, Esq., for the General Counsel.
Leon Rosenblatt, Esq., of West Hartford, Connecticut, for the Respondents.

SUPPLEMENTAL DECISION

STEVEN DAVIS, Administrative Law Judge. On August 31, 2006, the National Labor Relations Board issued a Decision and Order in 347 NLRB 1167 against Stagehands Referral Service (SRS) and International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO (Union or with SRS, Respondents), which directed the Respondents to jointly and severally make Stephen Foti (Foti) whole for any "loss of wages and other benefits he may have suffered by reason of their "discriminatory failure to refer him to employment after May 24, 2004."[1]

A controversy having arisen over the amount of backpay due to Foti, the Regional Director for Region 34 issued an amended compliance specification and notice of hearing on April 17, 2008. The Respondents' answer to the specification asserted certain affirmative defenses which will be discussed below.

Before the hearing opened, the Acting Regional Director

[1] The underlying unfair labor practice decision is reported at 347 NLRB 1167 (2006).

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] Counsel for the Respondents advised that he has appealed the Board's decision.

consolidated this case for hearing with Case 34–CB–2876.[2] That case involved issues arising from a complaint which asserted that Respondent Local 84 operated its hiring hall unlawfully in violation of Section 8(b)(1)(A) and (2) of the Act.

On May 27–29, 2008, a consolidated hearing was held before me in Hartford, Connecticut.[3] Because the issues in each case, this compliance case and the unfair labor practice case are different, involving dissimilar issues and different types of exceptions which may be taken, I have severed them, and accordingly will write separate decisions.[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents, I make the following findings and conclusions

I. ANALYSIS AND DISCUSSION

A. The Underlying Case

In the underlying case the Board found that Foti was unlawfully refused referrals by the Union on May 24, 2004, following the Union's denial of membership to him, and because of his nonmembership in the Union. The Respondents were ordered to jointly and severally make Foti whole for any "loss of wages and other benefits he may have suffered by reason of their "discriminatory failure to refer him to employment after May 24, 2004."

The Board found that following the Union's rejection of Foti's application for membership on May 24, 2004, he was told by Business Agent Charles Buckland that the Union would not refer him to jobs, and that SRS would not refer him to the Mohegan Sun Casino (Casino) because his application for membership had been denied. Foti stated that he stopped seeking referrals from Local 84 thereafter because he was told by Buckland that he would not be referred. He received no work from Local 84 from late May through November 2004.

In November 2004, upon learning that Foti had applied for unemployment insurance compensation, Business Agent Charles Morris asked him why he filed the application since he had not been calling in for work. Morris told Foti to call Buckland. He did so and was referred to work in late November and worked until early December. Foti did not call Buckland again until late March 2005. 347 NLRB at 1168.

Foti obtained work from Local 84 by calling the Union and advising that he was available for work, and also by being called by that Union when work was available. Foti obtained work from Local 84 and other area Stagehands Unions.

B. The Backpay Computation Process

The objective in determining the backpay amount is to approximate, as accurately as possible, what earnings Foti would have had during the backpay period had he continued to be referred. First, his earnings during an appropriate period of time prior to the discrimination, called the base period, must be determined.

1. The selection of the backpay formula

The base period used in the specification was the 1-year period, June 1, 2003 to May 31, 2004, prior to the Respondents' refusal to refer Foti. The backpay period was defined as the period beginning June 1, 2004. The Respondents admit that the base period and the start of the backpay period were appropriately set forth in the specification.[5]

As set forth below, Compliance Officer Dina Emirzian used Compliance Manual Formula One, Section 10540.2, to compute the backpay. That formula is a projection that Foti's average hours and earnings during the base period would be the same during the backpay period.[6]

Foti's base period earnings were divided into two categories: "Local 84 work" and "non-Local 84 work." Both types of earnings were utilized in computing the backpay amount for the base period and for the backpay period.

a. Local 84 work

As set forth in the specification, Foti's income in the base period was comprised of all referrals he received from the Union. The compliance officer accepted Foti's representations, supported by paystubs for work performed, concerning what constituted referrals "from the Union." The referrals which were included in these calculations included direct referrals where the Union's business agent directed Foti to report to employers with which the Union had a collective-bargaining agreement.

Also included by the compliance officer in the category of Local 84 referrals were those jobs to which Foti was sent by the Union's business agent at the request of other unions. Those jobs included those with employers with whom the Union had no contract or were outside the jurisdiction of Local 84. The procedure followed by Local 84 was that Union Business Agent Charles Buckland would call Foti and ask whether he was available to take a job in a certain city. If he was, Buckland gave him the location of the job and the time to report. Foti saw a union agent at the site, signed on and worked.

Buckland explained the procedure. He stated that he occasionally is asked by a business agent of a different Stagehands Union for help in filling a job call in that other union's jurisdictional area. In such cases, Buckland supplies the names of people he believes are available, and at the other agent's request, Buckland calls the stagehand and says that there is work in Bridgeport, for example, if he wants to go there. He denied that this constitutes a referral by him to a job in another jurisdiction. However, it appears that Buckland routinely performs these duties as part of his operation. Thus, he made referrals pursuant to calls he received from Locals 11, 23, 52, 53, 74,109, and 133.

Buckland testified that in making such calls to Foti to jobs in other jurisdictions, he was told by the business agent for the

[2] Prior to the opening of the hearing, the General Counsel filed a Motion for Summary Judgment with the Board and a Partial Motion for Summary Judgment with me. Both motions were denied.

[3] Following the close of the hearing, R. Exhs. 2 and 4 were received pursuant to the Respondents making available to the General Counsel the underlying documents which formed the basis of the two exhibits.

[4] At the hearing, the parties were advised that I intended to issue two decisions. Tr. 83, 84.

[5] Br., p. 8, and answer, p. 2.

[6] The Respondents challenge the use of Formula One and instead urge that Formula Two or no formula at all should be used. This will be discussed below.

other union that they were 1-day jobs. Occasionally the business agent calls Buckland and reports that the job will be continuing for more days and asks "do you mind if the guys [those originally referred] do that work?" Buckland agrees, and tells the agent to ask the workers if they want to continue working there. Buckland stated that in such circumstances where the stagehands continued to work, he does not consider that to be part of the initial referral.

The major source of disagreement between the parties is that the Respondents believe that those latter jobs, in which Foti was referred by the Union's business agent based upon calls he received from other unions to jobs in those other unions' jurisdictions and to employers not having contracts with the Union, are not properly considered "Local 84 jobs or Local 84 referrals" and should not be included in the base period or the backpay period. The result of including those jobs in the base period is obvious—Foti's work in those jobs caused a marked increase in his earnings which, when included in the base period, raised his pre-discrimination income level.

Buckland explained that when a business agent from a different local asks him to supply workers, he was not obligated to refer anyone. When he called the stagehand, the worker could accept or refuse the assignment and was under no obligation to take the job, and if he did report to the site, he had no obligation to continue to work there if the job continued after the first day. Buckland stated that, in contrast, if he referred the stagehand to a job in Local 84's jurisdiction the employee would have an obligation to accept it.

The Respondents correctly argue that when Foti worked in such jobs, dues were paid by Foti or by the employers involved to the other unions and not to Local 84. The Respondents assert that only referrals to those organizations having contracts with Local 84 should be considered in computing Foti's gross backpay. However, the remedy ordered by the Board was its standard remedy. The Respondents were ordered to make Foti whole for any loss of wages and other benefits he may have suffered by reason of the Respondents' failure to refer him to employment after May 24, 2004. "A backpay remedy covering *all* lost employment opportunities is appropriate for the violations found." (Emphasis in original.) *IATSE (AVW Audio Visual, Inc.)*, 352 NLRB 29, 32 (2008), citing the underlying case here, 347 NLRB 1167, and numerous other cases applying the same remedy.

Indeed, SRS, a corporation established by Local 84, referred stagehands to the Casino because the Casino would not sign an agreement with the Union and would not accept referrals from the Union. Such referrals were considered "Local 84 work" and the Board found that there was an exclusive hiring hall arrangement between Local 84 and SRS. 347 NLRB at 1167, fn. 2. Accordingly, even though there was no contractual arrangement between Local 84 and the Casino employer, as was the case with the non-Local 84 jobs Foti was sent to, the work Foti performed there was considered Local 84 work even by Local 84.[7]

The Respondents take issue with Compliance Officer Emirzian's method of determining whether a referral was properly attributed to Local 84. Emirzian testified hypothetically that if Local 84's agent told Foti that the Union had no work but that Local 53 was hiring and that he should call that union, she classified that as Local 53 work because the actual job came from Local 53 and the decision made to refer him to particular work was done by Local 53. However, that analysis is consistent with Emirzian's method used in computing the specification's amounts. She stated that if the Local 84 agent called Foti and told him that he was asked by Local 53, for example, to have an employee report to a specific job at a specific location, that would be Local 84 work because Local 84 was the source of the referral. In the first instance, Local 84 was not referring Foti to a specific job but just suggesting that Foti call Local 53 to see if a job was available.

It is true, as argued by the Respondents, that Emirzian stated that "there has to be some agreement between the union and whomever they're getting work out to, I would assume. The basis is the referral out." She also noted that "it doesn't matter to the region whether he was referred out to work either through an exclusive arrangement or through a non-exclusive arrangement." However, this does not mean, as the Respondents argue, that a formal arrangement must exist before a referral takes place. Such an agreement clearly took place in another union's business agent's request that Buckland send a worker to a venue within that other union's jurisdiction. Emirzian plainly did not imply, as suggested by the Union, that in order to be considered Local 84 work there must be a contractual agreement between the Union and the employer. Obviously, such an admission would be the opposite of the specification's premise—that work in other jurisdictions referred by Buckland pursuant to a request from another union is Local 84 work.

The General Counsel argues that inasmuch as Local 84 made the initial calls to Foti referring such jobs to him such jobs must be considered as Local 84 referrals even though those calls were initiated by business agents from other unions seeking additional help to fill their calls.

The General Counsel's argument is sound and reasonable. Regardless of where the call for the job originated, it was received by Foti from Local 84's agent. The call was for a specific referral to an identified, available job if he chose to accept it. He would not have received the job referral but for the call from the Union. Acting on the call from the Union, Foti went to the job location and performed work there. As set forth above, Local 84 Business Agent Buckland believed that such jobs lasted 1 day at most, but, as to certain jobs, Foti was able to remain on the job for several days or longer. The General Counsel correctly argues that whether the job was for 1 day or whether it lasted longer, the job must be attributed to Local 84 since that Union was the source of the call Foti received. Whether another Local's agent made the initial call to Local 84 is irrelevant since the origin of the call to Foti was Local 84. Foti acted on the call made to him from Local 84, not from any other union, and reported to a specific, available job. Foti's experience was that whenever he was given a referral by Buckland he got the job. There was never an occasion where upon arriving at a job that Buckland referred him to he was told there

[7] See R. Exh. 2, where SRS is listed as a venue to which Foti was referred.

was no work.

Accordingly, I find, in agreement with the specification, that Foti's earnings from referrals made by Local 84's business agent in which he first asked Foti whether he was available for a specific job and then, when he agreed, directed him to that location where Foti worked, constitute Local 84 work and were properly includible in Foti's base period and backpay period even where those jobs worked were outside the Union's jurisdiction and were performed for employers with which the Union did not have a contract.

b. Non-Local 84 work

Also included in Foti's earnings during the base period and the backpay period were those jobs he obtained on his own by "networking"—calling people in the industry and asking about upcoming jobs and by checking the internet and media sources for shows coming into the Hartford area. In such cases he obtained jobs directly from other Stagehands Unions and from employers. All such jobs in this category were referred to as "non-Local 84 work" and were included in the specification as "supplemental earnings" as will be more fully described below.

2. The Respondents' objections to formula one

The Respondents argue, as set forth in the Compliance Manual, that Formula One is applicable only when conditions that existed prior to the unlawful action would have continued unchanged during the backpay period.

The Respondents urge that Formula Two, Compliance Manual Section 10540.3, should have been used. That formula is calculated on the basis of the earnings of another employee or employees whose work, earnings and conditions of employment were comparable to those of the discriminatee both before and after the unlawful action. Formula Two is applicable, according to the manual, when there have been significant changes in conditions during the backpay period and when it can be concluded that the discriminatee's earnings would have changed in the same manner as did those of the comparable group.

The Respondents assert that conditions changed drastically because in April 2006, SRS stopped referring stagehands to the Casino. SRS is a corporation established by Local 84 which was created for the sole purpose of supplying stagehands to the Casino because the Casino, although willing to employ union members, was unwilling to sign contracts with unions. Thus, although the Casino would not accept referrals of employees from the Union, it would take such referrals from SRS. Accordingly, SRS referred workers to the Casino, sent an invoice to the Casino which the Casino paid, and SRS issued paychecks to the referred employees.

Thus, according to the Respondents, the specification is flawed since it is based on the assumption that Foti would have been referred to the same extent as in the base period. They argue that this assumption is not valid since referrals to Foti from the Casino through SRS were no longer available following April 2006, since SRS no longer made referrals to the Casino after that date.

The General Counsel argues, however, that even with the loss of the Casino account, Local 84 could have continued to have referred him to other venues. Compliance Officer Emirzian stated that she did not take into account in computing the gross backpay that SRS no longer referred workers to the Casino, and she did not change the gross backpay amount in that regard. Emirzian stated that she did not know what proportion of the base period sum of $29,757 was made up of SRS referrals to Foti.

I do not agree with the Respondent. First, no records were received in evidence which show that the number of referrals made to Foti would have been less because of the loss of the Casino account. Second, the records establish that, in fact, beginning in the fourth quarter of 2006, at a time when SRS no longer made referrals to the Casino, Local 84 referred Foti to a substantially greater degree than it did from the beginning of the backpay period. Thus, for the fourth quarter of 2006, and for the following five quarters, ending with the first quarter of 2008, respectively, Foti earned the following amounts from referrals from Local 84: $5291, $1509, $3395, $3512, $4917, and $2169.[8]

In contrast, the referrals to Foti by the Respondents including SRS in the eight quarters covering the period June 2004, through March 2006 (the second quarter of 2004 through the first quarter of 2006), when SRS was making referrals to the stagehands, were minimal: 0, 0, $224, 0, $411, $535, $1010, and $81.[9] Accordingly this shows that regardless of whether SRS no longer made referrals to the Casino beginning in April 2006, the Respondents were not referring Foti at a level to that made during the base period even when they were making referrals to the Casino. His quarterly earnings in that period of time were less than his quarterly earnings during the base period, $7439.[10]

Both the Board and the courts have applied a broad standard of reasonableness in assessing methods for calculating gross backpay. Any formula that approximates the amount the discriminatees would have earned absent the discrimination is acceptable if not unreasonable or arbitrary under the circumstances. The Board is required only to adopt a formula that will reasonably approximate the amount due; it need not find the exact amount. *Painting Co.*, 351 NLRB 42, 43 (2007).

The Board attempts to reconstruct as nearly as possible the economic life of the discriminatee and place him in the same financial condition he would have enjoyed in the absence of the unlawful discrimination. The objective . . . is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period, had there not been an unlawful action. *Contractor Services*, 351 NLRB 33, 35 (2007).

Based on the above cases, the purpose of this proceeding is to make whole the individual discriminated against—Foti. That is best done by approximating what *he* earned in the base period and projecting that amount into the backpay period. Because of the individual nature of stagehands' work, Foti's history and experience with respect to the jobs that he actually had

[8] GC Exh. 3, the referrals of Foti to "Local 84 work."

[9] GC Exh. 6.

[10] That figure is computed as follows: $29,757 average earnings during the 1-year base period divided by 52, equals $572.25 per week times 13 weeks to obtain the quarterly figure.

in the base period are the most appropriate and reliable sources of information as to what *he* would have earned in the backpay period. I accordingly find that the use of Formula One reasonably approximated what Foti would have earned in the backpay period.

3. The formula proposed by the Respondents

The Respondents' suggestion that Formula Two be used—an examination of the work records of comparable employees is rejected. Given the nature of the stagehands' work, the formula selected must be personalized and individualized to the employee who is to be made whole. There are too many variables in a stagehand's work experience to determine that a discriminatee's backpay should be decided upon the earnings of comparable employees during the periods in question.

In support of the use of Formula Two, at the hearing, the Respondents produced a document which identified four "comparable or representative" employees: William Graves, Connor Philbin, John Shea, and John Tsimbidaros.[11] Their dates of hire were December 8, 2001, December 8, 2001, February 9, 2002, and November 8, 2001, respectively. Foti's date of hire was May 10, 2002. Their seniority based on their date of hire is 161, 163, 169, and 158, respectively. Foti's seniority is 173.

The document listed the earnings of the five employees from 2002 through 2006 at six venues only, those with which Local 84 has some relationship, either a collective-bargaining agreement, an "agreement" as with Warner, and SRS. As I have found, above, limiting the computation to those few venues is inappropriate. Accordingly, the fact that Foti received fewer referrals than the other employees to those venues in the base period has little relevance.

Moreover, the seniority standings of those employees are irrelevant since, according to Buckland's testimony, during this period of time he referred people in order of seniority if he "had the luxury of time," adding that if he needed someone immediately he would call a worker who he knew was located near the venue or who he believed would respond quickly. Further, a showing that Foti received fewer referrals in the base period does not aid Local 84 since Buckland admitted that during that period of time he unlawfully referred union members before the nonmembers such as Foti, and when additional referrals were made thereafter he went to the top of the member list and began referring again from that point.

In addition, it does not appear that employees were referred by SRS to the Casino in order of seniority. Thus, in the period prior to October 15, 2005 and thereafter, Foti was referred to that venue 14 times, whereas 43 employees with lower seniority than him were referred to the Casino more often.[12] Accordingly, the Respondents' claims that the employees selected were comparable to Foti because their dates of hire were similar to Foti does not support their argument since referrals apparently were not made in order of seniority.

The Board has held that use of the comparable or representative employee formula is "premised on a showing that the work, earnings, and other conditions of employment of the allegedly representative employees were, in fact, comparable to those of the discriminatee both before and after the unlawful action. Consistent with these principles, 'the representative employee formula may not be employed unless it is representative' of the discriminatee." *Contractor Services,* above, citing *NLRB v. Ironworkers Local 378*, 532 F.2d 1241, 1243–1244 (9th Cir. 1976).

In *Contractor Services*, the Board rejected the Regional Office's use of a specification based on the comparable employee formula because the employer's work force, including the discriminatee Landers, worked intermittently whereas the allegedly comparable employees "were those who worked most consistently for the Respondents during the backpay period" and thus were not "representative" of the discriminatee. The Board noted that the allegedly comparable employees placed no limits on the referrals they would accept and several accepted referrals to distant states. Landers, in contrast, would not travel beyond the union's limited geographic jurisdiction in one state, would not travel to distant jobs, and did not look for or accept employment outside the union's geographic jurisdiction.

Here, we have the opposite situation. The allegedly comparable employees selected by the Respondents worked less often while Foti was recognized by Buckland as someone who would travel to distant sites at short notice and never refused a referral. Accordingly, the "comparable" employees identified by the Respondents were not representative of Foti. Therefore, I reject the Respondents' assertion that a comparable employee formula is more appropriate.

In *Laborers Local 38 (Hancock-Northwest),* 268 NLRB 167, 170 (1983), the Board specifically approved the use of Formula One and not Formula Two reasoning that under Formula Two the representative employees worked fewer hours during the backpay period. This is particularly appropriate here where Foti was very successful in obtaining work during the backpay period, while other, allegedly comparable employees may not have been as industrious.

Compliance Officer Emirzian testified that the Respondents did not provide any documents regarding the referrals it made at any time during the backpay period. She stated that the Regional Office considered using Formula Two using comparable employees, but she did not have full and complete records from the Union in order to track such employees' work records and to perform a Formula Two analysis. She conceded not having asked for such records but correctly believed that it was the Respondents' obligation to present such an argument with supporting documentation. To do such an analysis she needed to have the Union identify who the comparable employees were, their earnings during the base period, and an explanation as to why they were comparable employees. Although boxes of information were left at the Regional Office by the Respondents, she did not know what was contained therein. Although she was the successor compliance officer, no information which would have permitted a Formula Two analysis was contained in the file she inherited. Moreover, the Respondents did not offer any documents to her in furtherance of Formula Two.

Buckland confirmed this, stating that the Union did not present to the Regional Office in its investigation of this case Respondents' Exhibit 4—an analysis of the earnings of other em-

[11] R. Exh. 4.
[12] GC Exh. 2.

ployees during the base period, which was limited to the venues with which Local 84 has contracts. However, he did bring "boxes" of documents to the Regional Office during its investigation which contained the information which was ultimately used in the preparation of that exhibit. Buckland also conceded that he did not present to the Regional Office a formula regarding the comparable employee method of calculation to establish gross backpay, for example the replacement employee formula. See *Reliable Electric Co.,* 330 NLRB 714, 723 (2000), where the "compliance officer was "particularly hampered in the calculation of the gross backpay because no payroll records were furnished to aid in the computation . . . until shortly before this hearing."

Emirzian set forth her obligation as one to arrive at a "reasonable" calculation with a reasonable factual basis. Accordingly, Formula One was decided upon. I find that Formula One was the most appropriate formula to be applied here. The nature of the stagehands' work requires the application of Formula One in this case. Their work is not performed in a factory where they report for a predictable and easily measured 40 hours per week. Rather, stagehands obtain work from various sources including Local 84, other unions and directly from employers. They sometimes work on two jobs per day and may stay on a job for extended periods of time. Also, as was the case with Foti, while on one job he received referrals from Local 84 and accepted those referrals. Based upon the evidence it is also clear that Foti was a very industrious person, "networking" in order to obtain as much work as possible.

Accordingly, I find that the formula chosen by the Regional Office was reasonable and appropriate.

C. The Specification's Calculations

1. The base period

In computing the base period earnings, the compliance officer added Foti's paystubs for work performed pursuant to referrals from Local 84 for the 1-year base period, June 1, 2003, to May 31, 2004, and obtained a total of $29,757. Such work included referrals from the Union to jobs within its jurisdictional area and those in which the Union called him pursuant to a request of another union and directed him to report to work in that other Union's jurisdiction. Emirzian divided that number by 52 to obtain a weekly gross amount of $572.25 and then multiplied that amount by the 13 weeks in a quarter. Thus an average quarterly gross backpay amount in the base period for work performed pursuant to referrals from Local 84 was $7439.

As set forth above, the Respondents object to the specification's inclusion of work that Foti performed pursuant to requests he received from Local 84 to perform work pursuant to calls the Local 84 agent received from other unions. In support of this argument, the Respondents assert that the only referrals that should be included in the base period were those to which Local 84 referred him for work in its jurisdictional area and with which the Union has a contract, specifically, The Bushnell Theater, The Meadows, Madison Square Garden, Theatrical Stage Employees, and SRS. The amounts of earnings for such referrals total $13,078.46, less than half the amount that the specification assigns to "Local 84 work." I have rejected this argument, as set forth above.

Foti also worked during the base period in jobs he obtained on his own and not as a result of referrals from the Union. Earnings from those jobs were called supplemental earnings. He received a total of $20,560 from those jobs during the base period. That sum was divided by four quarters yielding an average quarterly "supplemental earnings" of $5140. The specification stated that the supplemental earnings were deducted from gross backpay only to the extent that they exceeded $5140. When such earnings exceeded $5140, they were deducted from gross backpay as interim earnings.

Emirzian correctly and appropriately reasoned that supplemental earnings were in effect earnings received from a "second job" which, according to Board policy, should not be deducted from gross backpay as interim earnings because such earnings were received during the base period before the discrimination began. Thus, it could be presumed that absent the discrimination, Foti would have continued to work on such other jobs even after he was refused referral by the Union. However, any increase of supplemental earnings beyond that earned in the base period was included as interim earnings and deducted from gross backpay.

The specification appropriately sets forth the gross backpay from the second quarter of 2004, through the first quarter of 2008, listing Foti's gross backpay according to the above formula, his interim earnings which consisted of referrals by Local 84 and supplemental earnings. Also set forth were Foti's interim expenses consisting of mileage fees.

2. The backpay period

As set forth above, the specification, using Formula One, projects Foti's earnings during the base period, the 1-year period prior to the discrimination, as the amount he would have earned during the backpay period. Thus, the gross backpay consists of Foti's earnings from "Local 84 work" which includes referrals from Local 84 to work at venues within its jurisdictional area, and referrals from Local 84 pursuant to requests from other unions to perform work in their jurisdictions. There has been no evidence that Local 84's practice of referring employees pursuant to requests from other unions has not continued into the backpay period. Indeed, it would seem, based upon Buckland's testimony that such referrals were made routinely, that such a practice continued thereafter.

Foti's gross backpay also includes "non-Local 84 work" which is work he obtained on his own during the base period reduced by his earnings in work provided by Local 84 in each quarter, and also reduced by his supplemental earnings, the work he obtained on his own to the extent that such work exceeded the supplemental earnings base of $5140 (the amount he earned in non-Local 84 work during the base period) less interim expenses. Such sums which exceeded $5140 are interim earnings.

It is undisputed that the backpay period begins on June 1, 2004. The specification asserts, and the evidence establishes, that the backpay period has not ended since Foti has not received referrals from the Union following May 24, 2004, to the extent that he had received them in the 1-year base period prior to May 24. The specification further states, and the evidence further establishes that in none of the calendar quarters follow-

ing May 24, did referrals from the Union rise to the level of referrals Foti received in the 1-year base period.

The Respondents make several arguments. First, they contend that the close of the backpay period chosen by the General Counsel is incorrect. They assert that the backpay period should end when Foti was first referred for employment after their unlawful refusal to refer him on May 24, 2004. Thus, they contend that the backpay period terminated at their first referral to Foti in December 2004. That referral was for 2 days. Foti was not referred again until April 13, 2005.

The Act is remedial. Its intent is to restore the discriminatee to that which would have been the case had the violation not occurred. The purpose of backpay is to make the discriminatee whole and compensate him as if the unlawful action had not occurred. The Board's remedial Order here is clear and broad. It did not state that Foti would be considered as having been made whole upon his first referral after the Union's May 24 refusal to refer him. Rather, the Respondents were ordered to make him whole for "any loss of wages and other benefits he may have suffered by reason of their discriminatory failure to refer him to employment after May 24, 2004." Accordingly, the remedial purposes of the Act will be satisfied when the Respondents restore the status quo ante—compensate Foti to the same extent following the discrimination as he enjoyed prior thereto. "A backpay remedy covering all lost employment opportunities is appropriate for the violations found." *AVW Audio Visual*, above. Accordingly, tolling the make-whole order in December 2004, when he was first referred following the May 24, 2004 refusal to refer him would not further the remedial purposes of the Act. Moreover, that December referral was part of the underlying case, and the Board, notwithstanding that that referral was made, nevertheless ordered that Foti be made whole for the period following May 2004.

The Respondents further contend that inasmuch as Foti was a person who had strong "networking" skills and actively sought and received referrals from sources other than the Respondents and found work on his own from other unions and even nonunion venues, the Respondents' obligation ended. They note Foti's testimony that he did not apply for full-time work at the Casino because he believed that such work, involving only 40 hours per week, would take him "out of the loop" preventing him from accepting higher paying jobs elsewhere. Foti concedes telling Buckland that he did not want to work full time for the Casino because he did "very well freelancing."

Foti admitted the obvious—he could not accept two jobs at the same time. But he added that he has worked two jobs in 1 day, and has done so about 20 to 30 times in the past 4 years. For example, he did set up work in the morning at one venue, and did "overnights" at another location. In fact, he stated that Buckland has asked him to do two shows on the same day. However, Compliance Officer Emirzian stated that the question before her was whether Foti was being referred by Local 84, not whether if he was working elsewhere he could accept Local 84 referrals. Emirzian explained that backpay is not tolled because the employee is working elsewhere. His work elsewhere is deducted from gross backpay as interim earnings as was done here. Emirzian stated that her focus was whether Foti received referrals from Local 84 during the backpay period and if he did not, backpay continues to run and his work elsewhere was considered as interim earnings if they were over the threshold that Foti had made in the base period. Emirzian stated that the fact that Foti worked for a particular employer does not necessarily mean that he was unavailable for work from Local 84. For example during the base period he accepted work from Local 84 and from other sources in the same quarter.

After being rejected for membership and told that he would not be referred because he was not a member, Foti was obligated, due to financial need and due to his duty to search for work and to find work wherever he could. Accordingly, the fact that he was working in non-Local 84 jobs or referrals does not diminish the Respondents' obligation to refer him. In addition, Buckland conceded that Foti had the right to call an employer or another local union directly for work unless the employer had an exclusive hiring hall arrangement with the Union. In such a case, Foti would have had to be referred by the Local 84.

The Respondent argues that in 2005 and 2006, Foti was "mostly not available for Local 84 or SRS" work because he was working with Local 538, Aventek and other employers, and that he used his "extensive network to pick and choose the most favorable jobs." Brief, p. 23. However, this overlooks the fact that Foti gave uncontradicted testimony that he never refused a Local 84 referral when made, and Buckland's testimony that he did not call him because he assumed that he was not available. However, I credit Foti's testimony that regardless of any work that he was doing at the time, if Local 84 called he would "reprioritize" and accept that work. Accordingly, the Respondents' argument that Foti's non-Local 84 work interfered with his Local 84 work because he could not work at two jobs at the same time, is misplaced. He credibly testified without contradiction that whenever he received a referral from Local 84 he accepted that work.

Foti worked extensively for Local 538 whose business agent and president are Rob Francis and Mike Hughes, respectively. In about April 2006, they formed an independent private company called Crew 538 or Stage Production Services, for the purpose of making referrals to the Casino, replacing SRS. After that time, no stagehands were referred to the Casino by SRS. Foti received referrals from Crew 538 to that venue. In July 2006, Foti became a member of Local 538. About 1 month later, the International Union directed Local 538 to be merged into Local 84, and at that time, Foti became a member of Local 84.

Upon becoming a member of Local 84 in August 2006, Foti and other members were told by Buckland that they should not accept work from Crew 538. As a result, Foti did not accept work from Crew 538 for about 9 or 10 months. However, in about mid-2007, due to financial necessity, he began taking calls from Crew 538 and performing work for that union.

Buckland testified that Local 84 was unhappy with the Casino and with Crew 538 because he considered it a nonunion work force which took work from it in Local 84's jurisdiction. Buckland did not support Crew 538, hoped that it would fail, and told his membership not to accept work from Crew 538. Buckland became aware that Foti was working for Crew 538,

and had worked at the Casino. He was "disappointed and unhappy" that he was working for Crew 538, telling Foti that he "crossed the line," had a "scab mentality," and that many members were unhappy about him taking that work because the Union's position is that Local 84 members would not work for Crew 538. Foti explained that he was not able to survive financially and needed to take the work. Buckland advised him to do what he believed he had to do. Thus, although Foti had an obligation to search for and obtain work, Local 84 sought to limit his opportunity to do so with Crew 538.

The Respondents argue that inasmuch as Foti became a member of Local 84 in July 2006, he could not, thereafter, be discriminated against for being a nonmember. The General Counsel's response, which I agree with, is that the liability phase of this case has been concluded with a finding that discrimination against Foti has occurred, and this case involves the remedy to be applied to make him whole because of that discrimination, specifically that backpay continues to run until Foti's referrals are restored to the amount he enjoyed prior to the discrimination against him. Therefore, backpay appropriately continued to run after Foti became a union member because has not yet been referred to the extent that he had been during the base, one year period before his discrimination.

Buckland testified that Foti was "not as available as normal" in 2006, and did not call in for 1 month prior to becoming a member of Local 84 in August 2006, but then he began calling in on a weekly basis, adding that Foti was "getting his lion's share of work through Local 538 . . . and other places." However, Foti did receive referrals from the Respondents prior to May 2004, without calling in. In fact, Foti stated that his referrals were so numerous in the base period that he did not have to call in. Indeed, Foti credibly testified that from late May 2004, until August 2006, he had no obligation to call the Union in order to receive referrals. Moreover, even assuming that Foti failed to call in, he had been told by Buckland in May 2004, that the Respondents would no longer refer him because of his nonmembership. The evidence further shows that notwithstanding the "unofficial requirement" that workers call in, Buckland nevertheless referred them to work.

In this regard, Buckland testified that he did not refer Foti because Foti did not advise the Union of his availability for a number of months, and Buckland, being aware of his strong networking contacts, assumed that he was working elsewhere. However, I note that Foti testified without contradiction that he always accepted a referral when asked by Local 84. Indeed, Buckland stated that Foti was highly regarded as his "go-to guy" who he "always" called when he needed a worker on short notice even to distant locations. Moreover, employees were not required to so inform the Union, but nevertheless Foti did so diligently, as discussed below.[13] Foti conceded receiving eight calls and accepting 12 referrals in 2005, from SRS for work at the Casino. Buckland testified that Foti called for work about 12 times between January and March 2006, but did not call from March to August 2006.

Buckland testified that according to Foti's work records, he received 200 and 170 referrals to non-Local 84 locations in 2005 and 2006, respectively. He received such work by "networking"—getting the jobs on his own. Buckland concluded that those jobs are more lucrative than those that Local 84 could provide, and assumes that Foti could not have accepted such Local 84 referrals because he was not available for them in those 2 years. Buckland surmised that if Foti did not call in for 6 months he obviously was working elsewhere, assuming that he was not available because he did not call the office. Nevertheless, Buckland noted that he did not attempt to call Foti during that period of time to offer him work, and stated that Foti has never been denied work.

Buckland testified that in 2005 and 2006, it was an "unofficial" requirement that employees call in for work, but conceded that those employees who did not call in would probably be referred anyway because of the need to provide employees for work requests. Buckland conceded that after Foti became a member of Local 84 he called in on a weekly basis. Later Buckland stated that during the period January 12, 2005 to February 27, 2006, there was a requirement, disseminated by word of mouth, that workers call in to advise of their availability to take calls. This is doubtful in that the Union's hiring hall rules making calling in a requirement were not adopted until May 2007.

Buckland testified that after referring Foti to the Casino on December 3, 2004, whenever Foti called for work if Buckland had work to refer him to he was referred. It must be noted that apparently Buckland waited for Foti to call him and ask for work, notwithstanding that 75 percent of the membership was not calling in on a weekly basis. However, Foti stated that he called in weekly even though others did not. Buckland stated that Foti should have known that he should call in to make his availability known when he returned from a work referral. However, this testimony must be contrasted with Buckland's other testimony that, prior to May 2004, Foti was his "go-to" person who he could rely on to take a call on short notice. Accordingly, Buckland's interest in calling Foti for referrals drastically declined after the discrimination against him. Further, Buckland's testimony that there were many occasions when work was not available and he so advised Foti this leads to the conclusion that Foti did call in when he wanted work and was told that none was available.

Finally, there was some evidence that Foti was assaulted by Local 84's members, apparently introduced to show that Foti was uncomfortable working with that Union's members and perhaps did not seek referrals for that reason. Nevertheless, Foti continued to receive referrals from Local 84 and continued to accept them.

Conclusion

I find that the calculations as set forth in the compliance specification were appropriately made and approximate the amount Foti would have earned absent the discrimination, and that they are not unreasonable or arbitrary under the circum-

[13] In this regard, R. Exh. 5, a list of about 70 jobs that Buckland testified that Foti would have been referred to in the period May 28 to December 3, 2004, if he called in, is given little weight inasmuch as Buckland told Foti in May 2004, that he would not be referred for work. Accordingly, Foti's calling in would be an exercise in futility. Moreover, he was not required to call in at that time.

stances. Based upon the above, I issue the following recommended[14]

ORDER

The Respondent, Stagehands Referral Service (SRS) and International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO, Hartford, Connecticut, shall make Stephen Foti whole by paying to him the sums set forth in attached Appendix—Backpay Calculation column entitled Total Backpay and Interest, such interest being computed in accordance with *New Horizons for the Retarded*, 283 NLRB 173 (1987), minus tax withholdings required by Federal and State laws.[15]

Dated, Washington, D.C. January 7, 2009

STAGEHANDS REFERRAL SERVICE, LLC

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] Emirzian testified that she became aware of and corrected certain errors made in the computations. Those corrections are set forth in the attached compliance specification.

APPENDIX

BACKPAY CALCULATION

CASE NAME: Stage Hands Referral Service & IATSE, Local 84
CASE NUMBER: 34-CA-10971 * 34-CB-2774
CLAIMANT: Stephen Foti ***BACKPAY PERIOD:*** 2004 - 2007 Interest to: 3/31/2008

Year	Qtr.	Gross Backpay	Interim Earnings		Interim Expenses	Net Interim Earnings	Net Backpay	Total Backpay	Interest	Total Backpay & Interest
2004	2nd	2,289.00	0.00	1	0.00	0.00	2,289.00	2,289.00	583.25	2,872.25
2004	3rd	7,439.00	0.00	2	0.00	0.00	7,439.00	7,439.00	1,821.12	9,260.12
2004	4th	7,215.00	0.00	3	0.00	0.00	7,215.00	7,215.00	1,676.10	8,891.10
2005	1st	7,439.00	0.00	4	0.00	0.00	7,439.00	7,439.00	1,635.15	9,074.15
2005	2nd	7,028.00	0.00	5	0.00	0.00	7,028.00	7,028.00	1,439.39	8,467.39
2005	3rd	6,904.00	1,885.00	6	422.00	1,463.00	5,441.00	5,441.00	1,032.74	6,473.74
2005	4th	6,429.00	4,770.00	7	668.00	4,102.00	2,327.00	2,327.00	400.96	2,727.96
2006	1st	7,358.00	5,149.00	8	853.00	4,296.00	3,062.00	3,062.00	474.02	3,536.02
2006	2nd	7,439.00	552.00	9	155.00	397.00	7,042.00	7,042.00	966.92	8,008.92
2006	3rd	7,439.00	1,030.00	10	262.00	768.00	6,671.00	6,671.00	782.56	7,453.56
2006	4th	1,518.00	0.00	11	0.00	0.00	1,518.00	1,518.00	147.71	1,665.71
2007	1st	5,930.00	0.00	12	0.00	0.00	5,930.00	5,930.00	458.43	6,388.43
2007	2nd	4,044.00	0.00	13	0.00	0.00	4,044.00	4,044.00	231.75	4,275.75
2007	3rd	3,927.00	0.00	14	0.00	0.00	3,927.00	3,927.00	146.51	4,073.51
2007	4th	2,522.00	1,932.00	15	223.00	1,709.00	813.00	813.00	14.07	827.07
2008	1st	5,270.00	0.00	16		0.00	5,270.00	5,270.00	0.00	5,270.00
Totals:							**77,455.00**	**77,455.00**	**11,810.70**	**89,265.70**

Notes: *1* Backpay period only 4 weeks of this quarter. 7,439/4=$2,289. Supplemental earnings of $2,985 did not exceed supplemental earning base.
2 Supplemental earnings of $2,151 did not exceed suppl. earning base.
3 Local 84 referrals totaled $224, 7,439-224=$7,215.Suppl. earnings of $4,520 did not exceed suppl.earning base
4 Supplemental earnings of $4561 did not exceed suppl. earning base.
5 Local 84 referrals totaled $411,7,439-411=$7,028.Suppl. earnings of $1,833 did not exceed suppl. base.
6 Local 84 referrals totaled $535, 7,439-535=$6,904. Suppl. earnings of 7,025-5,140 (base)=$1885. Suppl.expenses for 870 miles*.485=$422.
7 Local 84 referrals totaled $1,010,7,439-1,010=$6,429.Suppl. earnings of 9,911-5,140 (base)=$4,770. Suppl. expenses for 1,378 miles * .485=$668.
8 Local 84 referrals totaled $81, 7,439-81=$7,358. Suppl. earnings of 10,289-5,140(base)=$5,149. Suppl. expenses for 1,378 miles * .485=$853.
9 Suppl. earnings of 5,692-5,140=$552 Interim expenses for 320 miles * .485=$155.
10 Suppl. earnings of 6,170-5,140=$1,030. Suppl. expenses for 540 miles * .485=$262.
11 Local 84 referrals totaled $5,921,7,439-5,921=$1,518.Suppl. earnings of $956 did not exceed suppl. base.
12 Local 84 referrals totaled $1,509, 7,439-1,509=$5,930. Suppl. earnings of $342 did not exceed suppl. base.
13 Local 84 referrals totaled $3,395,7,439-3,395=$4,044.Suppl. earnings of $476 did not exceed base.
14 Local 84 referrals totaled $3,512,7439-3,512=$3,927.Suppl. earnings of $4,909 did not exceed suppl base.
15 Local 84 referrals totaled $4,917, 7439-4,917=$2,522. Suppl. earnings of $7,072-5,140(base)=$1,932. Suppl. expenses for 460 miles * .485=$223.
16 Local 84 referrals totaled $2,169, 7,439-2169=$5,270. Suppl.earnings of $4,191 did not exceed suppl.base.